IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation,
Petitioner,

vs.

GERTRUDE MOONEY, Administratrix of the Estate of Neil P. Mooney, Deceased,
Respondent.

No. 1367

125

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI
and
BRIEF IN SUPPORT THEREOF.

ARNOT L. SHEPPARD,
Attorney for Petitioner.

302 Union Station,
St. Louis, Missouri.

St. Louis Law Printing Co., 415 North Eighth Street. CEntral 4477.

INDEX.

Cases Cited.

Statutes Cited.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1944.

TERMINAL RAILROAD ASSOCIATION OF ST. LOUIS, a Corporation, Petitioner, vs. GERTRUDE MOONEY, Administratrix of the Estate of Neil P. Mooney, Deceased, Respondent.	No.....

PETITION FOR WRIT OF CERTIORARI

To the Supreme Court of Missouri.

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Comes now Terminal Railroad Association of St. Louis, a corporation, and respectfully petitions this Honorable Court to grant and to issue its writ of certiorari directed to the Supreme Court of Missouri (hereinafter referred to for convenience as the Court below), directing it to send to this Court for review its original opinion rendered March 5, 1945, by Division Two thereof, in this cause lately there pending, styled Gertrude Mooney, Administratrix of the Estate of Neil P. Mooney, Deceased, respondent,

v. Terminal Railroad Association of St. Louis, a corporation, appellant, No. 39,202 on the docket of the Court below, affirming a judgment of the Circuit Court of the City of St. Louis, Missouri, in said cause, in favor of respondent and against your petitioner herein.

Your petitioner further states that it timely presented to the Court below and filed therein, its motion for a rehearing of said cause or in the alternative to transfer said cause to the Supreme Court of Missouri, en banc; which said motion for a rehearing or to transfer to court en banc was by the Court below overruled on April 2, 1945, in said cause.

OPINION OF THE COURT BELOW.

The opinion of the Court below, which is by this petition sought to be reviewed, appears on pages ... to ..., inclusive, of the printed transcript of the record filed herein. That opinion has not yet been published in the official reports of the Supreme Court of Missouri, but appears in 186 S. W. (2d) 450. The second opinion, part of which is adopted by reference thereto in the present opinion, is published in 176 S. W. (2d) 605.

JURISDICTION OF THIS COURT.

The action here sought to be reviewed was brought under the Federal Employers' Liability Act (45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65). The jurisdiction of this Court is based upon Section 237 of the Judicial Code as amended by the Act of February 13, 1925, Chap. 229, 43 Stat. 937, Title 28, U. S. C. A., Sec. 344 (b), providing for review in this Court by certiorari of decisions of the highest courts of the several states

where any title, right, privilege or immunity is specially set up or claimed under a statute of the United States.

Brady v. Southern R. Co., 320 U. S. 476, 479, 88 L. Ed. 239, 242;
Bailey v. Central Vermont Ry., 319 U. S. 350, 87 L. Ed. 14, 44;
Steeley v. Kurn et al., 313 U. S. 545, 61 S. Ct. 1087, 85 L. Ed. 1512;
Seago, Admrx., v. N. Y. Cent. R. Co., 315 U. S. 781.

SUMMARY STATEMENT OF THE MATTER INVOLVED.

This action was commenced and has been maintained by respondent under the Federal Employers' Liability Act (hereinafter called the Act), 45 U. S. C. A., Sec. 51, Act of April 22, 1908, c. 149, Sec. 1, 35 Stat. 65, to recover from petitioner damages for the death of Neil P. Mooney, her husband, for the benefit of herself and her minor children.

Decedent was killed in the course of a switching movement in the City of St. Louis, Missouri, on November 28, 1939, when he stepped directly in front of a moving locomotive. At the time of his death Mooney was 30 years of age, his wife, respondent, was about the same age, and the two children were 4 years old and 5 months old, respectively.

Although respondent pleads nine separate acts of negligence against petitioner, she went to the jury upon but one of them, viz., the charge found in paragraph (7) that

> "defendant, by and through its engineer and the fireman, in charge of and operating said switch engine, saw or by the exercise of ordinary care could have seen the deceased walking toward and crossing said horn track in a position of imminent peril and likely to be struck by said engine and oblivious to his danger, in time thereafter for the defendant by and

through its agents and servants, with safety to said engine and the persons in charge thereof and riding the same, by the exercise of ordinary care, to have stopped the said engine, checked its speed or given timely and adequate warning to the deceased of its approach and thereby have avoided striking, injuring and killing the deceased, but negligently failed to do so" (R. 6, 7).

Petitioner answered with a denial of every allegation in respondent's petition.

Respondent's petition was in two counts, the first to recover Fifteen Thousand Dollars ($15,000.00) for decedent's conscious pain and suffering between his injury and his death; and the second to recover the sum of Ninety-five Thousand Dollars ($95,000.00) for the pecuniary loss sustained by respondent and her two minor children.

Judgment was rendered in her favor in the sum of Ten Thousand Dollars ($10,000.00) upon the first count and Forty-five Thousand Dollars ($45,000.00) upon the second count. Thereafter, and preceding the appeal to the Supreme Court of Missouri, respondent, in obedience to the order of the trial court, remitted Ten Thousand Dollars from the amount of the verdict rendered on count two of her petition, leaving the amount of the judgment Forty-five Thousand Dollars ($45,000.00).

Respondent was killed in the course of making a "flying switch," or in railroad vernacular, "dropping a car." The locomotive was headed west and coupled to its head end was a freight car (R. 19). The locomotive and the car had gone to a point about one hundred feet west of where the switch foreman was standing, and had stopped (R. 19). Decedent had ridden the front end of the car past the point where the switch foreman was standing, had got off (R. 20) and then had walked back to the switch foreman (R. 21).

The switch foreman then explained to decedent the movement which was to be made and told him just how the engine and car would move (R. 22); and warned decedent to look out for the locomotive (R. 46).

There appears opposite page 12 of the record a photograph made with the camera pointed toward the east, the direction in which the switching movement was to be made. It will be noticed that near the center of the photograph there is a large figure 4 which indicates track No. 4. This track curves towards the right and connects with a straight track upon which and just beyond the switch point is shown a box car. Between the red figure 4 and the box car, and closer to the box car, is a track which leads to the left of No. 4 and connects with track No. 5, which lies north of No. 4. The short track connecting tracks Nos. 4 and 5 is spoken of by the witnesses as the "cross-over."

While the switch foreman and decedent were standing at the switchstand the foreman told decedent that the engine would come down on track 4, that he would then throw the switch near which they were standing and permit the engine to pass through the cross-over between tracks 4 and 5, and the car would continue on track 4 (R. 22). At that time the foreman warned decedent to look out for the engine coming through the cross-over. He explained the intended movement to decedent not once but three times. Thereupon decedent told the foreman "All right" (R. 46). During the same conversation the foreman told decedent that it would be the latter's duty to block the car which was to continue east on No. 4, to prevent it from rolling back towards the west and fouling the switch point (R. 46, 54). At the end of the conversation decedent walked north across track No. 5, then east in a half-circle back towards No. 5 (R. 22). Decedent was proceeding in the

proper direction even though he walked north across track No. 5, as he would not be expected to step over the cross-over which would put him directly in the path of the locomotive (R. 51).

After the foreman had warned decedent and had informed him of the moves to be made, the operation was commenced by the foreman's giving the engineer the signal to make the flying switch. This signal was obeyed and the engine and car were started (R. 24, 60). The next step in the operation was for the switch foreman to, and he did, signal the engineer to check the speed to permit a switchman to uncouple the car from the locomotive (R. 35). The uncoupling was made (R. 36), and about that time the foreman looked towards decedent who then had turned towards No. 5 track (R. 36). The foreman then realized that unless decedent changed direction he might be struck by the locomotive on the crossover track (R. 25). Thereafter the foreman disregarded everything else and endeavored to warn both decedent and the engineer by shouting and giving signals (R. 25, 38). He was unable to attract the attention of either (R. 39, 85, 86).

Decedent continued to walk towards the cross-over and stepped "directly in front of the locomotive tender"; "he walked to that north rail and stepped over that rail just as the engine hit him"; "he stepped across that rail; that is when the engine hit him; couldn't be much closer" (R. 45).

The engineer testified that he did not see decedent after the latter was talking to the switch foreman before the movement commenced (R. 58). Decedent had no part to play in the actual switching movement that was about to take place (R. 47, 48), and, so far as the engineer was concerned, was of no importance in the operation (R. 81). The engineer's attention was directed towards the switch foreman for signals and the other switchman, whose duty it

was to uncouple the cars (R. 81). During this movement the engineer was looking alternately east and west, towards Luthy, the switch foreman, and towards the car he was pulling away from (R. 62, 65). At no time prior to decedent's injury did the engineer see any stop signal being given by the switch foreman (R. 86), but he stopped the engine as soon as possible after he saw the switch foreman's emergency stop signal (R. 85). By that time, however, the accident had already occurred.

During the whole course of this operation the locomotive bell was ringing (R. 44, 80).

Respondent's theory of recovery is based upon what is commonly called in Missouri the "humanitarian doctrine." The principles of that doctrine have been laid down by the Missouri Supreme Court in Banks v. Morris, 302 Mo. 254, 267, 257 S. W. 482. The five requisites for the application of that doctrine as laid down in the Banks case are:

(1) That plaintiff was in a position of peril;

(2) That defendant had notice (actual or constructive) of such peril;

(3) That defendant could have stopped or warned or in some other manner have avoided striking plaintiff or decedent;

(4) That defendant negligently failed to do so; and

(5) That the injury proximately resulted from such failure.

Petitioner's position is that if it be possible for respondent to recover notwithstanding decedent's negligence, she must base her case on the last clear chance doctrine as interpreted and applied by the federal courts, rather

than the Missouri humanitarian doctrine. As petitioner reads the decisions, the last clear chance doctrine does not permit recovery unless plaintiff's or decedent's negligence had stopped prior to the casualty, and unless he was actually seen in a position of peril by the defendant. The Missouri humanitarian doctrine does not require proof of either of these elements, and for that reason is much broader than the last clear chance doctrine.

Petitioner's further position on this issue is that this case is not controlled by that doctrine, but if it were, respondent has failed to make a case under that doctrine.

QUESTIONS PRESENTED.

I.

What becomes of uniformity of right and remedy if recovery in this case may be had in a state court of Missouri under the Missouri humanitarian doctrine which requires appreciably less proof to create liability than does the last clear chance doctrine, whereas if the case were brought in any other state's courts, or even in any federal court in Missouri, recovery would be denied for failure of the proof to make a case under the last clear chance doctrine?

II.

Do the provisions of the Federal Employers' Liability Act destroy the last clear chance doctrine as a ground for recovery in cases to which that act is applicable?

III.

In an action brought under the Federal Employers' Liability Act, may recovery be had under the Missouri humanitarian doctrine which no federal court (or any state court other than those of Missouri) has ever accepted or applied, and which requires no proof of either the termination of plaintiff's negligence prior to injury, or actual rather than constructive notice of his peril on the part of defendant?

IV.

Do the facts here make a submissible case under the last clear chance doctrine as it is interpreted and applied by the federal courts?

V.

Does the evidence show that decedent's own negligence was the sole proximate cause of his death?

VI.

Is a plaintiff bound by the testimony of his own witnesses where it is not contradicted, not contrary to the physical facts or challenged in any other manner? Or may he after proving certain facts and in the absence of any contradicting evidence, base his right to recover upon the theory that his own witnesses have testified falsely and the jury should therefore find the facts to be just contrary to his own evidence?

VII.

May plaintiff's counsel make a viciously unfair and highly prejudicial argument to the jury without committing reversible error?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT.

I.

If the opinion of the Court below is permitted to stand, then there is no uniformity of right or remedy under the Act. As one of the principal reasons for the passage of the Act was to secure such uniformity, the intent of Congress is completely frustrated if a plaintiff may recover upon one theory in one state, and another theory in another state, and possibly various other theories in several other states, depending upon the interpretations of the rule by the state courts.

The Missouri humanitarian doctrine is peculiar to Missouri. So far as petitioner has been able to ascertain, no court outside of Missouri recognizes it. The federal courts have never recognized it in the slightest degree, but have adhered to the last clear chance doctrine. The Court below has affirmed respondent's judgment recovered upon the Missouri humanitarian theory. Therefore, we have this situation: In the city of St. Louis the Federal Building is directly opposite the state Civil Courts Building. If plaintiff files his action in the Civil Courts Building on the north side of Market Street, he may recover under the Missouri humanitarian doctrine. On the other hand, if he files his action in the United States District Court on the south side of Market Street he cannot recover under the Missouri humanitarian doctrine. If he files his action in either a state court or a federal court in Illinois, he may not recover under the Missouri humanitarian doctrine, but must rely exclusively upon the last clear chance doctrine. If he has sufficient facts to make a case under the Missouri humanitarian doctrine, but not sufficient to make a case under the last clear chance doctrine, he may recover if he has filed his suit on the

north side of Market Street in the state court, and will be denied recovery if he has filed his suit on the south side of Market Street in the United States District Court. He will be denied recovery in Illinois whether he files his suit in the state or the federal court. He will be denied a recovery in every other state regardless of whether he sees fit to file his action in a state or federal court. As a consequence, there can be no uniformity of right or remedy if the opinion of the Court below shall be permitted to stand.

II.

The fundamental requisite for liability under the Act is, of course, negligence on the part of the defendant. However, the mere existence of negligence is not sufficient to create liability. It is necessary to go one step further and show that defendant's negligence, "in whole or in part," was the proximate cause of the casualty. As petitioner construes the evidence in this record, which is wholly uncontradicted and which is limited to that produced by respondent, there is no proximal causal negligence shown on the part of petitioner; but decedent's own negligence was the sole proximate cause of his death.

The scene of this casualty was a busy terminal switching yard. Decedent and his fellow employees were engaged in the switching of freight cars. Prior to the switching movement which resulted in decedent's death, the crew had been to a particular point to pick up a car which was moved about that hour practically every day. Apparently the car could be picked up only by moving the engine forward and coupling the car to the forward end of the engine; but when the car was brought from the industry out to the switch yard it had to be put on a particular track. The only practical way of getting the car on that track was to make a flying switch or to drop the car.

Decedent had not on any prior occasion worked with switch foreman Luthy (R. 20). Obviously, decedent's youth and the fact that Luthy had never seen him before (R. 20) explain why the foreman was at such pains to explain to decedent the exact switching movement which was to take place, and to warn decedent against the danger involved if he didn't watch where he was going. In any event, however, decedent was warned three times to watch out for the movement of the locomotive over the cross-over, and was informed in detail exactly how the movement was to be made (R. 46). As a consequence the question of his sole responsibility for his death must be determined in view of the fact that he had been specifically notified and warned of the movement to be made and of the necessity of keeping clear of both the locomotive and the car. It must be borne in mind, too, that from the commencement until the time of decedent's death, the locomotive bell was ringing a warning (R. 44, 80).

This switching movement commenced immediately after the conversation decedent had with his foreman in which he had been warned and cautioned to be on guard. It is impossible, therefore, to conclude that in the lapse of such a short time between the conversation and the casualty, decedent had forgotten the conversation and warnings which his foreman had just given him. On the other hand, if it is possible to conclude that decedent had forgotten such warnings, three times given, then it would seem to be entirely useless at any time to warn a switchman of an intended movement in a switching operation.

Unless decedent within that brief time had forgotten the warnings he had received, it cannot be said that he was oblivious to the danger of stepping upon the track immediately in front of the moving locomotive. Obviously, the switching crew had every right to expect decedent to stay out of the path of both the locomotive and the

engine. Consequently, no reason can be seen for the keeping of any special lookout for decedent under these circumstances, even though this record discloses that it was customary for engine men to watch out for persons on the track when it was possible for them to do so and at the same time perform the other duties required of them (R. 71, 81); and even though there were no obstructions to the engineer's view towards the east and north, whereby decedent remained in the physical view of the engineer at all times (R. 61, 62).

Therefore, there was no negligence on the part of petitioner; and there was gross proximate negligence on the part of decedent.

III.

Although the Court below has written three opinions in this case, but two of them appear in this record. In the second opinion it held that the provisions of the Federal Employers' Liability Act establishing comparative negligence as a governing rule of liability, in effect destroyed both the last clear chance doctrine and the Missouri humanitarian doctrine. In the present (third) opinion of the Court below it is said that it makes no difference whether the record facts fit the pattern of the humanitarian doctrine of Missouri or the last clear chance doctrine. The principal instruction upon which respondent recovered her verdicts both in the first and second hearings in the trial court, submitted as the sole hypothesis of recovery facts warranting a verdict in her favor under the principles of the Missouri humanitarian doctrine, which is the Missouri version of the last clear chance doctrine.

The particular and grave question which arises, and one reason why this Court should assume jurisdiction and determine the issue, is whether or not the Federal Em-

ployers' Liability Act has destroyed last clear chance negligence as a ground of recovery in actions brought under the Act. As petitioner views it, the comparative negligence principle found in the Act, has nothing whatever to do with last clear chance negligence, for the reason that the last clear chance rule does not commence to operate until both primary and contributory negligence have ceased to affect the responsibility for the casualty. Petitioner's position on this question is supported by the only decisions which it has been able to find on the question, some from Canada and some from the state courts of states which have passed comparative negligence statutes.

IV.

This Court has said several times that no recovery may be had under the Act except upon principles which are recognized and applied by the federal courts. Consequently, there is presented the question of whether or not recovery may be had under the Act in an action based upon the principles of the Missouri humanitarian doctrine, which no federal court has ever accepted and applied. The principles of that doctrine do not require proof of the termination of a decedent's negligence prior to his fatal injury or of defendant's actual notice of decedent's peril. The last clear chance doctrine recognized and applied by this Court and other federal courts requires proof of both. Petitioner says, therefore, that the Court below has affirmed the judgment in this case upon a principle of law which has never been recognized or applied by this Court or by any other federal court. Consequently, the opinion of the Court below is erroneous for the reason that it has permitted recovery upon a legal theory which has never been accepted by any of the federal courts as a ground for liability in cases under the Act.

V.

As petitioner reads this record, the facts fail to make a submissible case under the last clear chance doctrine as it is interpreted and applied by the federal courts. Petitioner's position is that if respondent is to recover despite her decedent's negligence, then her recovery must be had under the federal last clear chance doctrine. The facts in this record do not disclose a case under that doctrine, for the reason that admitting for the sake of argument only that decedent's negligence was not the sole proximate cause of his death, the evidence in this record clearly shows that his negligence continued up to the very instant of his death (R. 45). Moreover, the evidence wholly fails to show any actual notice on the part of the engineer of petitioner's locomotive that decedent was in peril (R. 58). For both of these reasons respondent has failed to make a case under the last clear chance doctrine.

VI.

As heretofore stated there is no testimony in this case except on behalf of respondent, as petitioner sought a directed verdict at the end of plaintiff's testimony, and when that was refused, offered no evidence. As a consequence, none of respondent's evidence is disputed or in any way challenged.

The position of respondent's counsel as shown by his argument to the jury (R. 164, 165, 179, 180, 181, 182, 183, 185, 186, 188 and 190) was that although his witnesses had testified to certain facts, viz., that decedent had been warned three times to look out for the locomotive and had been told just what the movement would be; that the engineer did not see decedent at any time during the switching movement subsequent to the conversation between

decedent and the switch foreman; that the engineer did not see the stop signal given by the switch foreman; nevertheless the jury should find the exact contrary of what his own witnesses had sworn; that his witnesses were not worthy of belief because they were in the employ of the petitioner, and the jury which should find exactly to the contrary of what respondent's witnesses had testified.

As appellant understands the rule in the federal courts, a party is bound by the testimony of his own witnesses provided it is inherently credible and there is no contrary evidence in the case. Certainly he cannot put the witnesses upon the stand, vouch for their credibility, have them tell their stories of the happening, and then ask the jury to believe that exactly the contrary happened, without any evidence whatever to support a contrary inference.

VII.

The argument made by plaintiff's counsel to the jury was viciously unfair and highly prejudicial. A reading of this record will disclose that the verdict of the jury was not arrived at in that calm, judicial frame of mind which is required if justice is to be done to both parties.

PRAYER.

Wherefore, petitioner prays that a writ of certiorari be issued by this Court, addressed to the Supreme Court of Missouri, directing that Court to certify to this Court on a day certain to be named therein, a full and complete transcript of the record of the proceedings in said cause of Gertrude Mooney, Administratrix of the Estate of Neil P. Mooney, respondent, v. Terminal Railroad Association of St. Louis, a corporation, appellant, that Court's number 39,202, to the end that said judgment of said Court

below may be reviewed by this Court, as provided by law, and that upon such review the judgment of said Supreme Court of Missouri in said cause, which became final on the second day of April, 1945, when petitioner's motion for a rehearing or to transfer to said court en banc was overruled; shall be reversed, and that petitioner shall have such relief as to this Court shall seem appropriate.

ARNOT L. SHEPPARD,
Attorney for Petitioner.